IN THE

Supreme Court of the United States

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October Term, 1950
No. 522

LESTER COLE,

Petitioner,

vs.

LOEW'S INCORPORATED, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit [R. 1040-1041] reversing a judgment of the District Court for the Southern District of California in petitioner's favor [R. 184-192] and remanding the cause to the said District Court for a new trial.

Opinions Below.

The opinion of the District Court [R. 193-215] is reported in 8 F. R. D. 508, 520-528. The Court rendered an opinion prior to the commencement of the trial on an application by respondent to transfer the cause to another District Judge [R. 47-76]. The opinion is reported in 76 Fed. Supp. 872. The opinion of the Court of Appeals [R. 992-1040] has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 22, 1950 [R. 1041]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c).

Constitutional and Statutory Provisions Involved.

The Constitutional and statutory provisions involved are set forth in the Appendix annexed to the petition herein.

Statement of the Matter Involved.

On January 7, 1948, the petitioner, Lester Cole, filed in the Superior Court of the State of California a complaint against the respondent, Loew's Incorporated, a corporation [R. 2-38]. The following facts were alleged in the complaint: Petitioner was by profession a writer with long experience in working as a writer in the motion picture industry [R. 2]. On December 5, 1945, petitioner and respondent entered into a contract of employment in writing [R. 7-32], which contract was amended by mutual consent of the parties on August 21, 1947 [R. 33-38]. Petitioner performed the obligations of the contract until December 2, 1947, on which day and thereafter his further

employment was prevented by the acts of the respondent [R. 3].

The complaint asserted that a controversy existed affecting the rights of the parties under the agreement; that on December 2, 1947, the respondent sent to the petitioner a written notice [R. 3-4] suspending his employment and payment of compensation under the contract of employment because at a hearing before a committee of the House of Representatives, petitioner had refused to answer certain questions put to the petitioner by such committee. It was stated in the notice of suspension that the petitioner by reason of his failure to answer these questions, and by his statements and conduct before the committee and otherwise in connection with the hearings, had shocked and offended the community, brought himself into public scorn and contempt, substantially lessened his value to the respondent as an employee, and prejudiced the respondent as employer and the motion picture industry in general.[1] The petitioner was notified that his suspension would continue until such time as petitioner was acquitted or purged himself of contempt of Congress and declared under oath that he was not a Communist [R. 4].

The petitioner alleged in his complaint that the statements contained in the notice of suspension were false and untrue; the petitioner further alleged that notwithstanding the truth or falsity of any statement in the notice of

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[1]The language of the notice of suspension was substantially the language contained in paragraph 5 of the contract [R. 12] except that no claim was made by the employer in the notice, or at any stage of the proceedings including the appeal, that petitioner had failed to conduct himself with "due regard to public conventions and morals." This was brought into the case for the first time when the Court of Appeals rendered its opinion [R. 1003-1005].

suspension that the defendant did not have the lawful right to suspend the petitioner upon the grounds stated in the notice of suspension or to impose the conditions set forth in said notice [R. 5]. The petitioner further averred that unless the relief prayed for in the complaint was granted, he would be irreparably injured because by reason of the suspension he was required to refrain from seeking employment elsewhere and required to remain uncompensated and unemployed and prevented from finding gainful employment in the motion picture industry and from writing and selling material to any producer or publisher [R. 5-6].

The prayer of the complaint was that petitioner have judgment declaring that respondent had no right to suspend petitioner's employment, that a temporary and permanent injunction issue enjoining respondent from enforcing or continuing in effect the notice of suspension, and for a mandatory decree requiring the respondent to set the notice of suspension aside, and declaring that petitioner was entitled to compensation as stipulated in the agreement from its inception to the date of judgment [R. 6]. On February 2, 1948, upon petition of respondent, the cause was ordered removed to the United States District Court for the Southern District of California [R. 39-40].

On March 2, 1948, the respondent filed its answer to the complaint [R. 41-42]. The respondent admitted the making of the agreements, the sending of notice of suspension, and the suspension of the petitioner. It denied the other material allegations of the complaint. The respon-

dent joined in the prayer for a declaration of the rights of the parties, requesting judgment declaring those rights to be as claimed by respondent [R. 42]. The respondent further demanded a jury trial "of all issues of fact herein triable to a jury." [R. 42.]

Thereafter, a motion made by petitioner for judgment on the pleadings [R. 220] was denied by the District Court [R. 232]. An application by the respondent that the District Court Judge assigned to the trial of the cause disqualify himself because of bias and prejudice was also denied [R. 43-77]. The pre-trial order [R. 77-100] was entered on November 22, 1948.

The cause came on for trial before Honorable Leon R. Yankwich, a Judge of the United States District Court for the Southern District of California on November 30, 1948 [R. 184]. On that day, a jury having been impanelled at respondent's request, respondent further requested that the jury return special verdicts with answers to specific questions [R. 131-133].[2] The issues upon which respondent sought determination were limited to the questions as to whether or not petitioner by his statements and conduct before the Congressional committee had brought himself into public hatred, scorn or ridicule; shocked, insulted or offended the community; lessened his value as an employee to respondent; prejudiced the respondent as employer, or the motion picture industry generally.

The evidence adduced at the trial before Court and jury included a complete visual and auditory representation of petitioner's statements and conduct before the

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[2]The questions submitted by the respondent were given to the jury by the District Court substantially unchanged [R. 163-164].

Congressional committee [R. 478-484, 484-485, 701]. Thus, the trier of the facts had the fullest opportunity to observe and hear the petitioner, not only at the trial, but at the very forum where his statements and conduct allegedly resulted in offending the community and bringing him into public scorn and contempt in violation of the contract of employment. It was admitted by the respondent at the close of the case that there was no evidence of any financial or monetary loss by the employer as a result of petitioner's conduct [R. 863-864].

The original contract between the parties [R. 7-32] was signed on December 5, 1945. The contract was for a term of two years at $1,150.00 a week, with options to respondent for additional periods of two years each at successive increases in salary [R. 77-78]. In the Spring of 1947, when petitioner's political affiliations were brought into question by some representatives of the House Committee on Un-American Activities, the petitioner was informed by respondent, through its vice-president and general manager, that "The studio policy and mine in particular is we don't give a damn what people write or say about Mr. Cole's politics. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio." [R. 397.]

When, in the Spring of 1947, the spokesmen for the motion picture industry, suggested that the industry refuse to employ "proven Communists," this proposal was unanimously rejected by the motion picture industry, including respondent [R. 810-811]. Again, in September,

1947, an inquiry made by two representatives of the House Committee concerning petitioner's politics led to the following reply from the vice president and general manager [R. 249] of the respondent:

> "They wanted to know whether I knew if they (Dalton Trumbo and Lester Cole) were Communists, and I said, 'No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts for me, and my responsibility if he is a Communist or Democrat or Republican, that the ideology is not put on the screen, except entertainment is put there. I assume that responsibility and I feel that it is in good hands right now because our record is very clear.'" [R. 289.]

At about the same time as the aforesaid statement was being made, negotiations between petitioner and respondent relative to an improvement in petitioner's written employment contract were being conducted. Petitioner notified respondent that if the inquiries and reports by the Congressional committee and the frequent press statements and discussions concerning his political affiliations made respondent unwilling to grant an adjustment in the contract, petitioner was willing to terminate the agreement and seek employment elsewhere [R. 403, 438, 439]. Respondent rejected petitioner's proposal. It asserted that what the public thought about petitioner's political affiliations was unimportant and whatever petitioner's political beliefs were, they were entirely his own business; that these were matters with which the studio was not at all concerned [R. 306, 401, 402, 403, 437, 438, 439].

Later, on September 23, 1947, the contract was amended to run for an additional two years with markedly improved

conditions relative to compensation, vacations and guaranteed employment [R. 404]. Even before the amended contract was executed, petitioner was served with a subpoena in the office of the contract department of the respondent [R. 446], to appear as a witness before the House Committee. The service having been made, the head of the contract department asked petitioner to proceed to the business at hand, that is to say, to conclude the arrangements to better petitioner's existing contract. Some three days later, respondent forwarded to petitioner a copy of the amendments to the contract, executed on behalf of respondent [R. 448].

Both before the Committee hearings were commenced on October 20, 1947, and thereafter, the attitude of respondent was manifested not only to petitioner but to the public at large. Paul V. McNutt, one of the attorneys especially employed by the motion picture industry to represent it at the same hearings before the House Committee, stated at a press conference on October 22, 1947 [Petitioner's Ex. 7, R. 459-460]:

> ". . . he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employees with the idea of denying employment to them. Such action . . . was without warrant of law. . . ."

On October 19, 1947, the attorneys for the motion picture employers, including respondent, met with petitioner's attorneys, and the attorneys of those who had been subpoenaed to testify. At this meeting, petitioner, through his attorneys, told respondent's counsel that he had given notice of a challenge to the House Committee's power to hold hearings. The respondent's attorneys were handed

copies of a telegram stating various constitutional grounds of challenge [R. 411-413]. At the conclusion of the conference, the spokesman for the employers gave firm assurance that there would be no blacklist [R. 409].

On October 27, 1947, Mr. Eric Johnston testified before the House Committee, saying in positive terms that the motion picture industry would not blacklist anyone on the ground that he was a Communist [R. 469-470].

The industry's public condemnation of the Committee and its conduct was shown in part by the following declarations:

On October 22, 1947, Mr. McNutt told the press [Petitioner's Ex. 8, R. 461-462]:

> "If the motion picture industry can be called before a committee and challenged on the content of the screen, then why not the newspaper, radio, magazine and book publishing business? Will they be safe if some Congressional Committee is allowed to try to dictate and control the screen's content? Of course they won't."

On October 27, 1947, it was publicly stated by the spokesman for the motion picture industry [Petitioner's Ex. 6, R. 455]:

> "Today, the motion picture industry, a part of which I represent, is under investigation by the Committee on Un-American Activities of the House of Representatives. In practice the Committee becomes prosecutor, judge and jury, and the individual becomes the defendant. . . . The time to challenge an attack or a misrepresentation is at the hour it is made. The longer the delay, the greater the damage. In America, we hold that the individual is a higher

power than the state which derives from him its own authority and must treat him accordingly. The sovereign rights and dignity of the individual supersede all else. There is no place in our society for any procedure or practice which cuts away part of those rights."

Thereafter, and on October 30, 1947, the petitioner testified before the Committee [R. 478].

On November 19, 1947, the president of the Motion Picture Producers Association, publicly declared on behalf of the producers, including respondent, that petitioner may have had the authority to challenge the Committee as he did, and that the question was something which first had to be tested in the courts [R. 805-806].[3] In a discussion with Mr. Mayer, head of respondent's studio after petitioner had testified, Mayer told petitioner it would have been better if he had answered the questions and had frankly told the public that he was or was not a Communist, whatever the fact was and "that it was no crime," as Mr. Mayer saw it, "to belong to the Communist Party at the present time." [R. 362.]

Petitioner returned to work after testifying and rendered his customary services. He was paid at the increased rate of compensation established by the amendment to his contract [R. 695]. On the day of petitioner's suspension, respondent knew that no charges had been made in any

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[3]As a matter of fact, the term of petitioner's employment by Loew's Inc., was for two additional years beginning December 5, 1947, and ending December 4, 1949 [Ex. B, R. 33]. During all of that period, petitioner Cole was available and ready to perform said contract. He was not convicted of contempt of Congress until June, 1950. (*U. S. v. Cole*, No. 1361-47, U. S. Dist. Ct. Dist. of Col.)

court against petitioner [R. 808]; nor had he as of the date of the trial ever been found guilty of any offense [R. 859-862].

The evidence showed that it was not until November 24, 1947, that any thought of suspending petitioner arose. At a conference of motion picture executives held on that day in New York City, it was jointly decided to blacklist a group of persons, including petitioner, who testified before the House Committee [R. 795]. The respondent's executives bowed to that policy wtih obvious reluctance. It is a plain inference which the trial judge drew from the testimony of these executives that petitioner was suspended only because of the coercive effect of the joint policy statement [R. 198-205, 339, 340].[4]

On December 2, 1947, petitioner was handed the notice of suspension. The testimony showed that even in 1948 respondent continued to distribute films written by petitioner; these films advertising upon their face the name of petitioner as their writer [R. 866-867].

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[4]The Court of Appeals was of the opinion that the "manner in which appellant [respondent] came to be persuaded to take the action which it obviously did is wholly without bearing on the case" [R. 1024]. In the first place, one of the issues at the trial was whether the grounds stated in the notice of suspension were true in fact. If the petitioner was suspended, not because his conduct had in any way demeaned him, offended the public or injured his employer, but because of a concerted policy based on other considerations which the employer felt bound to pursue, this was clearly a relevant matter for the consideration of the trier of the facts. Compare, *Buckeye Powder Co. v. Dupont De Nemours Powder Co.*, 248 U. S. 55, 64. In addition, such evidence was clearly relevant to the issue tendered in the pleadings concerning the irreparable injury caused petitioner by respondent's acceptance of this joint policy, for it led not only to loss of employment under petitioner's contract with respondent, but to loss of all employment opportunity in the industry.

The charge of the Court [R. 391-921, 955-960] to the jury was made after consideration of the instructions requested by counsel for petitioner and respondent [R. 101-130]. Counsel were permitted to make objections to the charge of the Court out of the presence of the jury but before they retired [R. 921]. Respondent's counsel made use of the opportunity to press certain objections which led to modifications of the charge, and in a number of instances obtained substantially the instructions which it sought [R. 921-955], instructions to which it nevertheless successfully objected on appeal.

The jury unanimously answered the special interrogatories in petitioner's favor [R. 964-966]. The District Court set the case for further hearing [R. 967] to afford the parties opportunity to present additional testimony if they desired [R. 968]. No additional testimony was offered.

Thereupon the District Court rendered its opinion on the whole case [R. 193-215]. The Court adopted the findings of the jury "and *in the exercise of its own jurisdiction,* the Court in accordance with the foregoing, and upon all the records and all of the evidence heard by the Court in this case, sitting both with and *without said jury,* does now make the following Findings of Fact and Conclusions of Law." [R. 172.] (Emphasis supplied.)

The District Court found as a fact that all of the contentions of petitioner were supported by the evidence and were true; that none of the contentions of the respondent were supported by the evidence and were untrue [R. 173-179]. The District Court found that petitioner was entitled to a declaration that respondent had no right to suspend him under the agreement upon the grounds

stated in the notice of suspension. The trial court found true all of the contentions of petitioner including the contention that, notwithstanding the truth or falsity of any statement in the nature of suspension, the respondent did not have the right to suspend petitioner, because the conduct complained of by respondent was not grounds for suspension under the contract and, in any event, because previous to petitioner's testimony before the Committee, respondent led him to believe that if he conducted himself as he later did, it would not constitute a breach of contract by petitioner [Findings Nos. 5, 8, 9 and 10, R. 176-178]. The trial court further found that petitioner was entitled to an order directing his reinstatement; and to compensation from date of suspension to the date of the judgment [R. 179-183]. Judgment based upon these findings of fact and conclusions of law was entered on December 30, 1948 [R. 184-192].

The respondent's specifications of errors on appeal [R. 982-988], were limited substantially to three in number: (1) Errors in the admission and exclusion of evidence; (2) Errors in instructions to the jury; (3) Refusal of the District Court to disqualify itself on the ground of bias and prejudice. No claim was made that the findings of the Court were erroneous; the only error assigned was that the District Court "erred in making findings of fact in addition to those found by the jury."[5] [R. 988.]

The opinion of the Court of Appeals [R. 992-1040] left the findings of the District Court undisturbed. The Court held that the District Court erred in some instruc-

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[5]This assignment was not thereafter urged on appeal either in the respondent's briefs or oral argument, and the opinion of the Court below made no reference to it.

tions to the jury [R. 1029-1036] and in the exclusion of certain evidence from their consideration [R. 1037-1040]. It upheld the District Court on its refusal to transfer the cause and overruled most of respondent's objections to the exclusion of evidence. The major portion of the opinion [R. 992-1029] was devoted to a discussion of petitioner's right to judgment as a matter of law. The Court of Appeals concluded that petitioner was not so entitled. [R. 999-1023.] The judgment of the District Court was reversed and the cause remanded for a new trial [R. 1040-1041]. The petitioner herein seeks a review of the decision and judgment of the Court of Appeals.

Questions Presented.

1. Whether in a suit for declaratory and general equitable relief, a judgment of the District Court based upon its own separate and independent findings of fact, after consideration of the entire case, may be reversed by the appellate court solely because of errors in instructions to an advisory jury and the exclusion of certain evidence from the jury's consideration.

2. Whether in a case where a trial judge, on conflicting evidence, has made independent findings of fact themselves sufficient to sustain the judgment on issues not requested to be submitted to the jury, an appellate court may reverse such judgment solely because of alleged errors in instructions to, and in admissions of evidence before, that jury.

3. Whether an appellate court may uphold the suspension of an employee without compensation under a written contract of employment upon a ground never invoked by the employer.

4. Whether the Court of Appeals erred in holding that petitioner's failure to answer the questions propounded by a Congressional committee concerning membership in the Communist Party and the Screen Writers' Guild justified petitioner's suspension from employment without compensation upon the ground that he failed to conduct himself "with due regard to public conventions and morals."

5. Whether the Court of Appeals erred in holding that the employer was empowered under the contract of employment to suspend petitioner without compensation until such time as he was acquitted or purged himself of contempt of the Congress of the United States and declared under oath that he was not a Communist.

6. Whether the decision and judgment of the Court of Appeals reversing the judgment rendered in favor of the petitioner for the reasons stated in the opinion of the Court of Appeals deprive the petitioner of his property without due process of law in violation of the Fifth Amendment to the Constitution.

7. Whether in the light of the entire record, the alleged errors in instruction to the jury, and in the exclusion of evidence from the jury, constituted reversible error:

(a) In instructing the jury on the rights of Congressional committees to propound inquiries to witnesses and the rights of the witnesses to decline to answer questions;

(b) In instructing the jury generally that in California an accusation of Communism was libelous;

(c) In failing to instruct the jury as requested by the employer that "among the facts judicially noticed is the fact that many average and respectable persons look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers";

(d) In instructing the jury on the law of waiver of a provision of a contract prior to breach, and waiver of a breach of contract subsequent to the alleged breach;

(e) In instructing the jury that under the declared law of California the Communist Party is a lawful political party and the courts of that State do not take judicial notice that the Communist Party advocates the forcible overthrow of government;

(f) In excluding some evidence of the conduct of other witnesses before the Congressional committee.

Reasons for Granting the Writ.

1. The Court of Appeals, in reversing the judgment rendered by the District Court in petitioner's favor, appears to have overlooked, erroneously, the nature of the proceedings instituted in the trial court, the kind of relief sought therein, and the limited legal effect of the jury's special verdict. The Court of Appeals appears to have assumed that the action was at law for breach of contract and that a general verdict was rendered by the jury, binding upon the trial court and the parties. Based upon this assumption, the Court of Appeals proceeded to deprive the petitioner of his judgment because of alleged errors in instructions to the jury and the exclusion of certain evidence from their consideration.

The action was not at law; it was in equity. The jury's verdict was not binding; it was advisory. Although the District Court accepted the findings of the jury contained in its special verdicts, the Court was at liberty to disregard them. The District Court made separate findings of fact and conclusions of law which were not attacked by the

respondent in its appeal from the District Court [R. 982-988] and which were left undisturbed by the Court of Appeals. Under the circumstances, errors, if any, in instructions to the jury or in exclusion of evidence, could not affect the judgment and decree which the District Court finally entered.

The decision of the Court of Appeals appears to be in conflict with applicable decisions of this Court. (*Wilson v. Riddle*, 123 U. S. 608; *Johnson v. Harmon*, 94 U. S. 371; *McKinley Creek Mining Co. v. Alaska United Mining Co.*, 183 U. S. 563; *Idaho and Oregon Land Improvement Co. v. Bradbury*, 132 U. S. 509.) The ruling of the Court of Appeals is also in conflict with applicable decisions of the California courts. (*Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655; *Hewlett v. Pilcher*, 85 Cal. 542, 24 Pac. 781; *Schooler v. Williamson*, 192 Cal. 472, 221 Pac. 195.) The decision of the Court of Appeals appears to have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (*McNabb v. United States*, 318 U. S. 332; *Thiel v. Southern Pacific Co.*, 328 U. S. 217.)

It was the conduct of the respondent employer which determined the character of the proceedings instituted herein. The employer did not terminate the agreement. It did not discharge the petitioner. "We are not firing him. We are suspending him until he is proven guilty or innocent of contempt." [R. 339.] The notice of suspension was specifically limited to alleged violations of some of the provisions of Section 5 of the agreement [R. 3-4, 12]. The suspension was to continue until such time as "you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under

oath that you are not a Communist." [R. 4.] Moreover, the same notice of suspension warned the petitioner that "this action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have." [R. 4.]

By the terms of the agreement, petitioner bound himself to render services solely and exclusively for the producer [R. 8] throughout the term of the contract, and any extensions thereof [R. 17, 19-20]. The parties agreed that the petitioner's services were "of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law." [R. 17.] Thus, if the petitioner sought other employment he took the risk, as did his future employer, that a suit to enjoin the petitioner from working elsewhere would be instituted. In addition, and as a matter of fact, he could not obtain employment elsewhere in the motion picture industry in the light of the evidence adduced at the trial concerning the common policy reached in New York by the motion picture producers [R. 337-340]. As the District Court found [Findings of Fact, No. 13, R. 178]:

> "The plaintiff has been and, unless this Court grants appropriate injunctive relief, will be irreparably injured in that by reason of said purported suspension plaintiff is required to refrain from seeking employment elsewhere and is required to remain uncompensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented from writing and selling any literary material to any other motion picture producer, publisher, or theatrical producer."

It was under these circumstances that the suit herein was instituted. Damages could not adequately compensate the petitioner for his perpetual exclusion from the motion picture industry, the loss of his skills or the credits for his work. He therefore sought the aid of a court of equity to enjoin the employer from continuing its suspension and from continuing participation in the industry blacklist against him and imposing unlawful conditions for his return, and a mandatory decree directing his reemployment, together with a declaration of his rights under the agreement.[6]

The Court of Appeals apparently believed that petitioner suffered no irreparable injury because "the notice of suspension permitted Cole to resume his employment if he complied with the conditions, and he was at the same time at liberty to seek employment elsewhere should he choose not to conform" [R. 1026], citing *California Business and Professions Code*, Section 16600. Not only was this ruling contrary to the findings of the District Court (compare Rule 52(a), *Federal Rules of Civil Procedure*), but it was contrary to the Court of Appeals' own decision in *Universal Pictures Co. v. Cummings*, 150 F. 2d 986 (1945), involving a similar motion picture contract. "A continued suspension and refusal to pay appellee's compensation, coupled with a continuous extension of the contract for like periods and a prohibition within the contract against appellee's right to offer his services to any other employer could deny to this appellee forever the right to work at his profession and earn a livelihood" (*supra*, p. 987). In

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[6]In California a suit for declaratory judgment is a suit in equity. (*Adams v. Cook*, 15 Cal. 2d 352, 101 P. 2d 484; *Mulligan v. Wilson*, 94 Cal. App. 2d 286, 210 P. 2d 526; *Code of Civil Procedure*, Secs. 1060-1062.)

addition, the decision of the Court of Appeals was contrary to the laws of California and the decisions of the courts of that State. (*California Labor Code*, Sec. 2855; *California Code of Civil Procedure*, Sec. 526; *Warner Bros. Pictures v. Brodel*, 31 Cal. 2d 766, 192 P. 2d 949, cert. denied 335 U. S. 844, 873.)

This Court has held that in order to preclude the granting of relief by a chancery court, the remedy at law must be plain and adequate, prompt, speedy and final, and sufficient, full and complete. (*Hillsborough Township v. Cromwell*, 326 U. S. 620; *American Life Insurance Co. v. Stewart*, 300 U. S. 203; *Watson v. Sutherland*, 72 U. S. 74; *Rich v. Braxton*, 158 U. S. 375.) This Court has further held that if a cause is once properly in a court of equity, it will ordinarily be retained for all purposes, even though the Court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. (*McGowan v. Parish*, 237 U. S. 285; *Camp v. Boyd*, 229 U. S. 530; *United States v. Union Pacific Railway Co.*, 160 U. S. 1.) If at the time a suit is instituted in equity there is no plain, adequate and complete relief at law, the jurisdiction of the Court is not lost simply because a legal remedy may later become available. (*Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288.)

Thus, the petitioner, as was his legal right, instituted this suit in equity for declaratory and injunctive relief [R. 2-38]. The respondent in its answer joined in the prayer for a declaration of the rights and duties of the parties [R. 42]. No motion was made to dismiss the complaint because of adequacy of remedy at law. The District Court throughout the trial treated the cause as a suit in equity [R. 47, 169, 178, 182, 183, 184, 189, 191,

193, 195, 720, 967-980]. Upon the return of the special verdict, the cause was set for further hearing [R. 967] to permit counsel for either side to present any additional testimony [R. 968]. The District Court stated that "this is different from the ordinary case where the jurors are called upon to decide a case for the plaintiff or for the defendant." [R. 967.] The Court of Appeals noted without criticism that "the Court adopted the findings of the jury and made additional ones of its own" [R. 996], and that the judgment decreed declaratory and equitable relief [R. 996].

Since the issues tendered by the pleadings were purely equitable, and the relief prayed for typically and traditionally in the nature of equitable relief, and no adequate remedy at law existent, the findings of the jury were advisory only. The submission of the special interrogatories were discretionary on the part of the trial court, and the use which the Court made of the jury's conclusions was also discretionary. (*Kohn v. McNulta,* 147 U. S. 238; *Garsed v. Beall,* 92 U. S. 684; *Basey v. Gallagher,* 87 U. S. 670.) The jurisdiction of the District Court arose from the general long-existing equity jurisdiction of the federal courts in diverse citizenship cases. (*American Life Insurance Co. v. Stewart,* 300 U. S. 23.) Whether in truth the petitioner violated any of the terms of the contract as set forth in the notice of suspension could be appropriately submitted by the District Court to a jury "for the information of the chancellor," but the District Court remained responsible for the ultimate decisions of fact as well as of law.

The District Court gave careful consideration to the evidence adduced at the trial as indicated by its careful and critical opinion [R. 193-215] and the extensive findings

of fact and conclusions of law [R. 169-183]. The Court heard the witnesses, and was the proper judge of their credibility. No claim was made by the respondent that the findings were erroneous, nor did the Court of Appeals so hold. The findings were, therefore, conclusive upon the appellate court. The trial was of lengthy duration, with numerous exhibits and oral testimony of witnesses presented for both sides. The abbreviated record before this Court is 1,041 pages in length. The fact issues before the District Court involved such questions as whether petitioner's conduct before a Congressional committee had "shocked" and "offended" the community; had brought petitioner into "public scorn" and "contempt"; had "lessened his value as an employee; or had prejudiced" his employer and the industry in general. These were imponderables which only a trier of the facts could determine, and which an appellate court could not re-weigh. The judgment of the District Court should therefore have been left undisturbed. (Rule 52(a), *Federal Rules of Civil Procedure; United States v. Yellow Cab Co.,* 338 U. S. 338; *Walling v. General Industries Co.,* 330 U. S. 545; *Case Manufacturing Co. v. Soxman,* 138 U. S. 431.)

2. The independent findings of fact and conclusions of law of the trial court on the two issues of (a) construction of the contract and (b) waiver of its provisions before breach (not submitted to the jury and not requested by either party to be so submitted) were sufficient in and of themselves to require affirmance of the judgment on appeal.

The issues raised by the pleadings herein are, first, the truth or the falsity of the statements of fact in the notice of suspension and, second, the right to suspend notwithstanding the truth or falsity of said statements. The request of the respondent that only special verdicts be

submitted to the jury [R. 131-133] left all issues not covered by such special verdicts to be tried by the Court alone. (Rules 39(b) and 49(a), *Federal Rules of Civil Procedure.*)

The only issues submitted to the jury at respondent's request related *solely to the truth of the statements set forth in the notice of suspension, i. e.,* whether the petitioner did bring himself "into public hatred, contempt, scorn or ridicule" or did tend to "shock, insult or offend the community" or did "prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally." The only issue submitted to the jury at the request of the petitioner related to waiver *subsequent* to the alleged breach of the contract.

However, evidence was offered by both parties and was received relating, first, to whether paragraph 5 of the contract embraced the *kind* of conduct which led to the suspension and, second, assuming that it did, whether there had been a waiver of that provision of the contract, prior to its alleged breach, as distinguished from a waiver of its breach.

The trial court heard the evidence relating to these issues, not submitted to the jury, and independently of the jury made findings thereon favorable to petitioner [R. 177 and specifically see Findings 8 and 10; generally see Findings 5 and 9, R. 175, 178]. On appeal, except for the contention that no independent findings should have been made at all [R. 982, 988] no assignments of error were directed at these findings nor were they otherwise challenged. "Taken at their face value, as they must be * * *" (*Steuart & Bro., Inc. v. Bowles,* 322 U. S. 398, 406) these findings required an affirmance of the

judgment regardless of the validity of the assignments of error directed at the rulings on evidence offered before the jury and the instructions given to it.

Because the contract was not so plain and unambiguous as to speak for itself, unaided by extrinsic matters, evidence was admissible to aid the Court in interpreting the contract in the sense in which the parties understood it. Such evidence, where conflicting, raised questions of fact required to be determined to aid the Court in ruling upon the legal effect of the contract. (*Brett v. Vanomar Producers,* 45 Cal. App. 286, 289, 187 Pac. 758; *H. Laughlin E. Corp. v. J. W. Leavitt & Co.,* 116 Cal. App. 197, 200, 2 P. 2d 511.)

Included in the kind of evidence in the light of which a contract should be interpreted are "contemporaneous conversations and circumstances of the making of the agreement" (*Meadows v. Emett & Chandler,* 86 Cal. App. 2d 1, 11, 193 P. 2d 785; and see *Sand Filtration Corp. v. Cowardin,* 213 U. S. 360), and "the construction the parties themselves have placed upon it") *Christenson v. Gorton-Pew Fisheries Co.,* 8 F. 2d 689, C. C. A. 2d, 1925), particularly before it becomes the subject of controversy (*Old Colony v. Omaha,* 230 U. S. 100. See also *California Civil Code,* Secs. 1647 and 3535; *California Code of Civil Procedure,* Sec. 1860; *Walsh v. Walsh,* 18 Cal. 2d 439, 116 P. 2d 62).

> "There is no surer way to find out what parties meant, than to see what they have done." (*Brooklyn Life Ins. Co. v. Dutcher,* 95 U. S. 269, 273.)

At the trial evidence was introduced from which the trial judge could properly draw the conclusions, if indeed any others were possible, that respondent's policies and

its practical interpretation of its contract as made known to petitioner in connection therewith, and relied upon by him when executing the amended agreement, were (1) It was not concerned with the political activities in which the petitioner engaged; (2) It did not give a "damn" about what people *wrote or said* publicly about his politics; (3) Despite widespread publicity concerning petitioner's alleged politics he was not to be penalized therefor but instead, because his work as a writer justified it, he was to receive a raise [R. 306, 332, 396-397, 400-401].

It follows that paragraph 5 of the contract was properly construed by the trial judge upon the evidence in accordance with the *intent* of the parties, to be inapplicable to a suspension notice predicated upon the proposition that petitioner had violated his contract by conducting himself in such a manner as to lead the public to believe he was a Communist.[7]

The parties themselves having so construed their contract as to preclude non-membership in the Communist Party as a condition of employment, and the Court following the taking of evidence on the subject, having found in accordance therewith, it follows logically that the Court should have concluded, as it did, that the condition requiring a non-Communist oath could not be imposed by the employer and that therefore its notice of suspension requiring such an oath was void [see Findings of Fact, No. 5, R. 176, and Conclusions of Law II and VII, R. 180, 181].

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[7]Throughout the case, respondent took the position that the issue was not whether Mr. Cole was or was not a Communist but whether, by his conduct, he had led the public to believe that he was [R. 600-601].

Not only did the Court have before it evidence showing the parties' construction of paragraph 5 during the negotiation of the amended agreement, but it had evidence showing their practical construction of said paragraph as it related to petitioner's appearance before the House Committee. The same evidence bore also on the issue of waiver of paragraph 5 before petitioner testified before the Committee.[8]

There was evidence before the trial court from which it could have concluded as it actually did [Findings 5, 8, 9 and 10; R. 173, 176-178], that:

a. The respondent was advised that the petitioner intended to resist the Committee's inquiry on constitutional grounds; and the respondent advised petitioner that it had no objection and that his rights as an employee would not suffer thereby [R. 409-413].[9]

b. Before petitioner testified the respondent itself made public statements, upon which petitioner relied, indicating that it believed the Committee was violating the Constitution of the United States in many particulars, including due process of law under the Fifth Amendment particularly

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[8]The question as to a waiver "subsequent" to the alleged breach of the contract, *i. e.*, a waiver of the alleged breach, was submitted to the jury [Question 4, R. 171-172]. The issue as to waiver, of paragraph 5 of the contract, in *advance* of the conduct leading to the suspension was not so submitted. "A provision of a contract may be waived." There is such a waiver where there is a "holding out * * * that the performance of the condition is dispensed with." (*Empire Gas & Fuel Co. v. Stein*, 15 F. 2d 323, 328 (C. C. A. 8th, 1926), cert. denied; *Stein v. Empire Gas & Fuel Co.*, 274 U. S. 737.)

[9]It should be remembered that the course followed by petitioner was the only method available for securing judicial review of his constitutional objections.

with respect to persons who, like the petitioner, were placed in the position of defendants by the Committee [Plaintiff's Ex. 6, R. 454] and freedom of speech under the First Amendment, as the petitioner himself repeatedly urged [Plaintiff's Ex. 9, R. 461, 463, 412]. The challenge of proceedings of the Committee, so characterized by respondent itself, in the only manner open to petitioner, could not thereafter be declared a violation of paragraph 5 of the contract, particularly where the respondent itself had insisted prior to petitioner's testimony that there is "no place in our system for any procedure or practice which cuts away part of these rights" and "the time to challenge an attack is at the time it is made." [Plaintiff's Ex. 6, R. 454.]

c. Petitioner was assured by respondent, and relied on the assurance, that there would be no blacklist because such a procedure was considered illegal by the motion picture producers [Plaintiff's Ex. 7, R. 409, 460, 464, 469-70]. Regardless of what the respondent might have done acting alone the notice of suspension was void because it was put into effect only as a part of an industry-wide blacklisting process, the illegality of which has been pronounced by the respondent and relied upon by the petitioner.

The trial court's findings are consonant with the fixed principles of law, first, that any ambiguity must be resolved against the party which prepared the contract, *Taylor v. Hill,* 31 Cal. 2d 373, 189 P. 2d 258; California Civil Code 1654, and, second, that conditions involving forfeiture such as paragraph 5 must be strictly construed if that is reasonably possible. (*Retsloff v. Smith*, 79 Cal. App. 443, 249 Pac. 886.)

It may be conceded that evidence was introduced from which the trial judge might have drawn inferences contrary to those set forth above. But the record contains ample evidence to support the conclusions relied upon here —and that should be decisive in this proceeding.[10]

It is respectfully submitted that a reviewing court may not substitute its interpretation of the possible conflicting inferences for that of the trier of the fact because:

> "the rule is that an appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court * * * and not substitute another of its own where parol evidence was introduced in aid of its interpretation, and such evidence is such that conflicting inferences may be drawn therefrom."
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> *Estate of Rule,* 25 Cal. 2d 1, 11, 152 P. 2d 1003.

See also, *Re 620 Church Street Building Corp.,* 299 U. S. 24, 27; *Tennant v. Peoria and Pekin Union R. R. Co.,* 321 U. S. 29; *Vicksburg & P. P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415; *Pacific Portland Cement Co. v. Food Machine Co.,* 178 F. 2d 541 (C. C. A. 9, 1949); *Wilson v. Brown,* 5 Cal. 2d 425, 55 P. 2d 485; *Johnston v. Landucci,* 21 Cal. 2d 63, 130 P. 2d 405, 148 A. L. R. 1355; *Teater v. Good Hope,* 14 Cal. 2d 196, 93 P. 2d 112; *Universal v. California,* 20 Cal. 2d 751, 128 P. 2d 777; *Crillo v. Curtis,* 91 Cal. App. 2d 263, 204 P. 2d 941.

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[10]The allegedly erroneously excluded evidence went solely to the question of the effect of the conduct upon the public and had no bearing upon the issues of the meaning of the contract and the waiver of its provisions.

But the Appellate Court here did substitute its interpretation of the contract for that of the trier of the fact. Following its statement of facts the court below said:

> "We think that it cannot be said as a matter of law that these facts, uncontroverted as they are, establish either that there was a practical construction of the contract as having the meaning appellee says should be attached to it, or that there had been a waiver of performance in advance." [R. 1013.]

It is respectfully submitted that this statement of the problem basically misconceives the function of an appellate court. The issue before the court below, assuming that the trial court's findings had been challenged, was not whether the evidence before the trial court as a matter of law required the findings that were made; rather it was whether the evidence furnished a basis for the findings made, regardless of whether or not different findings might also stand on appeal. It is further respectfully submitted that the error of the court below is aggravated by the fact that it applied this erroneous rule to findings with respect to which no error had been assigned on appeal and which were therefore required to be accepted by it.

This approach of the court below presents questions of serious importance to the administration of justice. The right to have the judge who saw the witnesses and had the only first-hand opportunity to determine questions of credibility and to evaluate the evidence as a whole is of great consequence to all litigants as well as to the legal process. To permit an appellate court to reverse a trial court through the process of reweighing facts and inferences would defeat the function of the trial judge, place impossible burdens upon appellate courts and leave litigants in

a constant state of uncertainty. It is respectfully submitted that in the particulars noted under this point "the decision below is probably in conflict with the applicable decisions of this court." *Re 620 Church St. Building Corp.*, 299 U. S. 24, 27; *Tennant v. Peoria & Pekin R. R. Co., supra,* 321 U. S. 29; *Vicksburg and P. P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415, and "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision." Rule 38, Sec. 5(b), Supreme Court Rules.

3. The Court of Appeals rendered an opinion on important questions of federal law which have not been, but should be, settled by this Court, and has decided other federal questions in a way probably in conflict with applicable decisions of this Court and with the decisions of other Courts of Appeal on the same matters. This case raises an important question in the administration of justice and substantive law, viz: whether contractual promises under our legal system are "no more than teasing illusions." (*Ex Parte Kawato,* 317 U. S. 69, 78.) Moreover, if the principles of law enunciated by the Court of Appeals remain unreviewed by this Court, they will guide not only a new trial herein, but the trial of other cases now pending where the same issues are involved.[11]

Since the entire motion picture industry [R. 337-339] is concentrated in the Ninth Circuit and since motion pic-

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[11] *Lardner v. 20th Century-Fox*, No. 8003 BH; *Scott v. R.K.O.*, No. 7983 BH; *Dmytryk v. R.K.O.*, No. 7982 BH; *Trumbo v. Loew's*, No. 7922 B; *Maltz et al. v. Loew's et al.*, No. 9717 PH; United States District Court for the Southern District of California, Central Division.

ture artists' contracts contain provisions similar to paragraph 5, litigation elsewhere with a resulting conflict of decision as to the law applicable to these "moral clauses" under similar circumstances is improbable. It is respectfully submitted that this presents an additional reason for review by this Court. (*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50.) Judicial sanction for the avoidance upon political grounds of the pledged word and the deprivation of a person's property rights under a written agreement raises important questions of constitutional law which have not heretofore been decided by this Court.

It is stated in the opinion of the Court of Appeals [R. 1003-1005] that the petitioner conducted himself in such a manner as to violate the provisions of the first clause of paragraph 5 of the agreement [R. 12], that is, failed "to conduct himself with due regard to public conventions and morals." It is further stated in the opinion that this view of petitioner's conduct was not advanced at the trial, and no question presenting that theory was propounded to the jury [R. 1003]. The Court of Appeals indicated that such question should have been put to the jury, that due regard to public conventions includes "more than a mere requirement of obedience to law"; it includes "an agreement to refrain from the commission of a misdemeanor of this character." [R. 1005.]

The Court of Appeals was clearly in error. In the first place, the carefully worded notice of suspension [R. 3-4] makes no mention of the first clause of paragraph 5 of the contract. The notice of suspension was limited to the following grounds: (1) "You have shocked and offended the community;" (2) "brought yourself into public scorn and contempt;" (3) "substantially lessened your value to us as an employee;" (4) "prejudiced us as your employer

and the motion picture industry in general." No claim was ever made by the employer that the petitioner under the agreement had failed to conduct himself "with due regard to public conventions and morals." For reasons best known to the employer, such claim was never made before, during or after the trial, or upon appeal. As the Court of Appeals point out [R. 1003], the questions submitted to the jury were substantially in the form requested by the respondent employer [R. 131-132]. They never included a request with respect to the first clause of paragraph 5, upon which the Court of Appeals placed so much weight.

The decision of the Court of Appeals is contrary to the applicable decisions of this Court and in conflict with the decisions of other circuit courts of appeal on the same matter. (*Ohio and Mississippi Ry. Co. v. McCarthy,* 96 U. S. 258; *Davis v. Wakelee,* 156 U. S. 680; *Rode & Brand v. Kamm Games,* 181 F. 2d 584, 587 (Ct. of App., 2d, 1950).) As this Court stated in *Ohio and Mississippi Ry. Co. v. McCarthy, supra,* p. 267:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

The vice here runs deeper. The employer here never changed his grounds for suspension; it is the Court of Appeals which injected a new ground for suspension, and this without solicitation by the employer.

The opinion of the Court of Appeals appears to reflect the view that it was trying the case *de novo;* that it was

empowered to substitute its view of the facts in place of the trier of the facts in the District Court; and that the case was to be determined as if the events had occurred in 1950. The actualities of the situation were quite different. The petitioner appeared before the Congressional Committee on October 30, 1947. On December 2, 1947, the employer served notice of suspension upon specified grounds. On that date no proceedings of any kind were pending against petitioner. The factual issue on this phase of the case was for the trial court's determination [see Pre-Trial Order, R. 77-85], and this in the light of the terms of a binding agreement and the effect of the petitioner's conduct on the community and the employer in October, 1947. The issue was not, it is respectfully submitted, the reaction of the Court of Appeals in 1950 to the petitioner's conduct dehors the agreement.

Because of this misconception of the issues before it, the Court of Appeals was led into the error of making statements of fact without any support in the record [R. 1004, 1027, 1028], of weighing the conflicting evidence in disregard of the fact that this was the function of the trial court [R. 1006-1024], and to make rulings of law wholly inapplicable to the case before it.

Moreover, the Court of Appeals erred in holding that petitioner's assertion of legal and constitutional objections to inquiries made by a legislative committee violated the provisions of the agreement herein or that he had conducted himself without "due regard to public conventions." This Court has sustained the right of an individual to test constitutional principles by inviting contempt proceedings when this was the only legal avenue available (*Thomas v. Collins*, 323 U. S. 516, 536), or even by inviting criminal prosecution (*Smith v. Cahoon*, 283 U. S. 553, 562).

4. The holding by the Court of Appeals that respondent was empowered to impose the conditions set forth in the notice of suspension[12] raises important legal and constitutional questions which have not been, but should be, settled by this Court. The ruling affects not only petitioner herein, but all employees whose rights are grounded in written contracts of employment. For if the ruling of the Court of Appeals stands, it will mean that employers may with impunity deprive persons of their livelihoods unless they comply with the same or similar political conditions, and this despite the fact that the employment is pursuant to a binding agreement, containing no such condition, solemnly entered into by the employer. The Court of Appeals' decision reaches beyond the issue of the power of a private employer to impose political oaths of varying character upon employees, important as that issue is. Here the judiciary, exercising a governmental function, has upheld the suspension of a person from his employment because of his refusal to take a non-Communist oath and comply with other political conditions even if he assuredly violated no provision of his written agreement. It is respectfully submitted that this is governmental action which effectively impairs the obligation of a contract and deprives persons of their property without due process of law in violation of the Fifth Amendment to the Constitution. Compare, *Truax v. Raich*, 239 U. S. 33; *Meyer v. Nebraska*, 262 U. S. 390, 399.

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[12]R. 4: "This is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us * * * until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist."

The ruling of the Court of Appeals is also contrary to statutory provisions and judicial decisions of the State of California. In California, the Communist Party is a lawful political party and the courts will not take judicial notice that such party advocates the forcible overthrow of government. (*Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889.) California Labor Code, Sections 1101, 1102 and 1103, forbid the use by an employer of the employment relationship to control or influence his employees "by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." *Supra*, Section 1102. (See, *Lockheed v. Superior Court*, 28 Cal. 2d 481, 171 P. 2d 21.) Contracts which require persons to barter away their rights and duties as citizens are illegal. (*Restatement, Contracts*, Section 567. See also, 2 *Elliott, Contracts* (1913 Ed.), Section 714; *Martin v. Wade*, 37 Cal. 168, 174; *Board of Education v. Haddon Farms*, 128 N. J. L. 306, 25 Atl. 2d 905; *Spayd v. Ringling Rock Lodge*, 270 Pa. 67, 113 Atl. 70. Compare, *California Elections Code*, Sections 11580, 11581, 11582.)

The requirement that petitioner as a condition to reinstatement either purge himself or be acquitted of contempt of Congress was clearly impossible of performance. The Court of Appeals conceded that petitioner's acquittal was a matter beyond his control [R. 1027]. There is no provision in law for purging oneself of contempt of Congress. The Court of Appeals was of the opinion that the petitioner should nevertheless have made the effort [R. 1027]. The issue, however, before the Court of Appeals was whether the employer was empowered to impose conditions which were legally impossible of performance. Whether

as a matter of fact petitioner's return to the committee would have lessened the alleged effect upon himself, the community and the employer, were matters for the consideration of the trier of the facts upon proper evidence; not for the appellate court.

The effect of the Court of Appeals' ruling is simply this: A witness who appears before a Congressional committee "is bound rightly to construe the statute. His mistaken view of the law is no defense." (*Sinclair v. United States,* 279 U. S. 263, 299. Compare, *Blau v. United States,* No. 22, Oct. Term 1950, decided December 11, 1950.)

It follows, in the view of the Court of Appeals, that a private employer may therefore, in disregard of a binding obligation, suspend his employee without compensation until such time as it has been determined whether the employee guessed rightly; and if the employee has mistakenly asserted a constitutional privilege, then the employer may impose the sanction of tearing up the contract and relieving the employer of all further obligation. Thus, a witness who appears before a Congressional committee faces more than the sanctions imposed by law when he unsuccessfully invokes a Constitutional privilege; he faces simultaneous loss of his contract and property rights by the arbitrary edict of an employer. It is submitted that a ruling of such far reaching effect with its grave constitutional implications should be reviewed by this Court.

5. The Court of Appeals erred in reversing the judgment because of alleged error on instructions to the jury or the exclusion of certain evidence from their consideration [R. 1029-1040]. The charge of the learned District Court was comprehensive and complete and left to the jury an unfettered determination of the facts upon correct and ap-

plicable principles of law [R. 891-921, 955-962]. It is settled by this Court that no error can be predicated upon the charge of a trial court when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury. (*California Insurance Co. v. Union Compress Co.,* 133 U. S. 387; *Lovejoy v. United States,* 128 U. S. 171.) It is not error to refuse to give an instruction which has been covered by a correct instruction already given. (*Agnew v. United States,* 165 U. S. 36; *Bennett v. United States,* 227 U. S. 333; *Holt v. United States,* 218 U. S. 245.)

The Court of Appeals appears to have misconceived the issues tendered by the pleadings and the evidence before the trier of the facts. Those issues were originally created by the respondent when it sent petitioner the notice of suspension. The issues before the jury were whether petitioner had so conducted himself before the committee as to cause the effects specified in the provisions of paragraph 5 of the contract. It was clearly relevant for the jury to know—to aid it in its determination of the purported effect of petitioner's conduct—what the rights of witnesses before a Congressional committee were [R. 911-913]. The District Court gave carefully balanced instructions relative to the powers of Congressional committees and witnesses before them [R. 911-913]. The Court of Appeals found no error as a matter of law in such instructions. If, in the view of the Court of Appeals, the question of whether petitioner was guilty of contempt was not before the jury [R. 1029], it would appear to have been inappropriate for the District Court to merely advise the jury "that the Committee had the right to propound the questions and that it was the duty of Cole to answer them" [R. 1029], as the opinion of the Court of Appeals suggests. In determining

the issue of whether petitioner had shocked and offended the community or injured the employer by his conduct, it was clearly relevant for the jury to be instructed as to the rights of the Committee and the witnesses before it. (See, *Jones v. Securities and Exchange Commission*, 298 U. S. 1; *McGraw v. Daugherty*, 273 U. S. 135; *Sinclair v. United States*, 279 U. S. 263, 299, "no moral turpitude is involved."

There appears to be no error in the District Court's instructions [R. 915-918] on the California law of libel and the status of the Communist Party in that State [R. 1031-1032, 1035-1037]. These instructions were precipitated by respondent's request that the jury be charged [R. 128] that it is "conclusively deemed to be known by the Court and jury" that many average and respectable persons in this country "look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers." The requested instruction was properly refused by the trial court in the exercise of its discretion. (20 *American Jurisprudence*, p. 53.) The respondent however, was not harmed by this refusal because the jury was told that a charge that a person is a Communist "would expose a person to the hatred, contempt and ridicule of many persons" [R. 915]. On the other hand, the jury was told that under the declared law of California it was lawful for a person to be a member of the Communist Party [R. 915]. These were appropriate and fair instructions to guide the jury in the determination of the issues before them. (See *Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889.)

The instructions relating to waiver subsequent to the alleged breach [R. 907-910, 958] were given substantially [R. 958] in the form requested by respondent [R. 947].

It was therefore in no position to predicate error upon such instruction.

The District Court did not err in excluding evidence of the conduct of other witnesses before the Committee [R. 1039]. It was not an abuse of discretion to refuse to turn petitioner's suit into a trial of the conduct of nine other persons before the Committee, where not the slightest foundation was laid to charge the petitioner with the conduct of others (*First Unitarian Society v. Faulkner,* 91 U. S. 415), and the District Court permitted respondent sufficient latitude of examination on the subject [R. 621-665; 771-773].

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Statutory Provisions Involved.

Code of Civil Procedure, State of California, Section 526:

"* * * An injunction cannot be granted:

* * * 5. To prevent the breach of a contract (other than a contract in writing for the rendition or furnishing of personal service from one to another where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum, and where the promised service is of a special, unique, unusual, extraordinary or intellectual character which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law) the performance of which would not be specifically enforced; * * *."

Labor Code, State of California, Section 2855:

"A contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 of this division, may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it. If the employee vol-

untarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation."

Business and Professions Code, State of California, Section 16600:

"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Labor Code, State of California, Section 1101:

"No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

Section 1102:

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Section 1103:

"Any employer who violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1000 or both, and, in the case of a corporation, by a fine of not to exceed $5000."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 522.

LESTER COLE,

Petitioner,

vs.

LOEW'S, INCORPORATED, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Appeals is found at pages 992-1040 of the Record; and is reported in 185 F. 2d 641.

Jurisdiction.

The judgment of the Court of Appeals reversing the judgment of the District Court and remanding the cause for a new trial was entered on November 22, 1950. [R. 1041.] The petition for ~~rehearing~~ certiorari was presented on January 29, 1951, and notice of filing was served on February 2, 1951. Jurisdiction of this Court arises under sections 1254(1) and 2101(c) of U. S. Code, Title 28.

Statement of the Case.[1]

The controversy which gives rise to this litigation may be summarized as follows:

Petitioner was employed by respondent as a writer under a contract which in part provided that petitioner would conduct himself with due regard to public conventions and morals and would not do anything that would tend to bring him into public scorn or contempt or shock or offend the community or prejudice his employer or the motion picture industry. [R. 12.] In 1947 the Committee on Un-American Activities of the House of Representatives conducted a public hearing as part of its inquiry regarding alleged Communist infiltration of the motion picture industry. [R. 321, 505.] Petitioner as a witness, and as one of a group with which he was publicly identified, refused to disclose whether he was or had been a member of the Communist Party. [R. 478-84, 362, 379-86, 284-7.] He was cited for contempt of the Congress. [R. 808.]

The hearing and the conduct of petitioner and his associates received intensive nation-wide publicity through all media of news distribution. [R. 351-3, 471, 651, 656-64, 778, 859; Defts. Exs. G and H, R. 783-4.] Respondent contended that the conduct of petitioner in connection with said hearing created a wide-spread belief (a) that he was a Communist and held in contempt the Congress and the fundamental institutions of this country; and (b) that the respondent and the industry employed

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[1]Respondent reluctantly presents a statement of the case because it is thought that only by that procedure can it effectively point out what are believed to be omissions and inaccuracies in petitioner's statement (herein designated as "P. S."). So that the court may more readily compare the two statements, respondent will substantially follow petitioner's order of presentation.

and harbored Communists and were sympathetic and indulgent toward Communism. Respondent further contended that petitioner's conduct (in violation of the beforementioned provisions of his employment contract, variously referred to as the "public relations" or "morals" clause) brought or tended to bring petitioner into public scorn and contempt, tended to shock and offend the community and prejudiced the interests of the respondent and the motion picture industry, and, consequently, that petitioner had breached his contract. [R. 3-4.]

Respondent served petitioner with a notice that his employment and compensation were suspended (because of his breach of the contract provision just referred to) until he had been acquitted or had purged himself of the contempt of Congress and had declared under oath that he was not a Communist. [R. 3-4.]

The controversy was presented to the court through an action for declaratory relief instituted by petitioner, in which he asserted his right to a continuance of his compensation and employment and alleged that respondent did not have the right to suspend either upon the grounds stated in the notice of suspension or on any other grounds. As an incident, petitioner alleged in conventional form the irreparable injury flowing from the suspension and prayed that respondent be enjoined from continuing the suspension in force. [R. 5-6.]

Upon the demand of the respondent for a jury trial "of all issues triable to a jury" [R. 41-42] the case was tried before a jury to whom all issues, except that of petitioner's right to an injunction, were submitted in the form of special verdicts. [R. 163-4.] In the trial court the case was tried upon the theory and all evidence was directed

to the proposition that, if the jury found that petitioner had breached the above-referred-to provision of his employment contract, he was not entitled to his compensation or a continuance of his employment. There was no suggestion by petitioner during the trial or on appeal that a jury verdict to that effect would be merely advisory. There was, however, a contention by petitioner in the trial court and in the Court of Appeals that the conditions of the suspension were not proper and a counter-contention by respondent that they were, and that, in any event, if there had been a prior breach of his contract obligations by petitioner, this would excuse performance by respondent of its contract obligations, including the payment of compensation to petitioner.

The verdict of the jury [R. 163-4] and the consequent judgment of the trial court was that petitioner had not violated his contract and was entitled to enforce it. Judgment was entered for petitioner's contract compensation to December 30, 1948, in the sum of $75,600; that respondent pay further compensation until the expiration of the contract; and that it withdraw its notice of suspension. [R. 184-192.]

On appeal respondent attacked the judgment on the ground that it had not had a fair trial because of erroneous exclusion and admission of evidence, because of errors in the trial court's charge to the jury, and because of the refusal of the trial judge to disqualify himself. The Court of Appeals reversed on the basis of respondent's contentions except as to the disqualification of the trial judge.

In his brief on appeal, petitioner for the first time advanced a contention that the parties had placed a practical construction on the contract which excluded his complained-of conduct before the Committee from the so-called

"public relations" or "morals" clause. Notwithstanding respondent's objection that such a contention was not open to petitioner because it raised an issue not presented, considered or determined below, the Court of Appeals considered but rejected petitioner's contention. [R. 1013.]

Corrections and Additions to Petitioner's Statement.

A sound picture and a separate sound record of petitioner's appearance before the Committee were introduced at the trial.[2] [R. 478-484, 484-5, 701.]

It was stated by the respondent in connection with an objection to certain evidence offered by petitioner [R. 863-4] that no evidence had been introduced to show financial or monetary loss suffered by respondent through petitioner's conduct. The statement was not an admission that no financial loss had been suffered.[3] [See P. S. p. 6.]

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[2]No mention is made by petitioner of the fact that respondent sought unsuccessfully to introduce a sound picture showing the conduct and testimony of petitioner in conjunction with that of nine other witnesses [R. 651, 721-2, 731-6, 827-8, 850-5, 622-3, 715-16] with whom it appeared, as stated by the Circuit Court, petitioner had collaborated as to their joint conduct before the Committee and without which, as pointed out by the Circuit Court, the true import of petitioner's behavior on the witness stand could not be judged. [R. 1039-40. See Argument, paragraph 10, *post.*]

[3]Injury to respondent's reputation did not require a money measurement and was implicit in the public reaction which respondent was not permitted to prove and of which the court refused to instruct the jury as a matter of judicial knowledge. Moreover, injury from an employee's breach is not a necessary condition to the exercise of the employer's rights. [*Bank of America v. Republic Productions,* 44 Cal. App. 2d 651, 654, 112 P. 2d 972, 974; *May v. New York M. Pic. Corp.,* 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Jerome v. Queen City Cycle Co.,* 163 N. Y. 351, 57 N. E. 485, 487; *Farmer v. First Tr. Co.* (C. C. A. 7), 236 Fed. 671, 673; *Von Heyne v. Tompkins,* 89 Minn. 77, 93 N. W. 901, 903-4; *Brown v. Dupuy* (C. C. A. 7), 4 F. 2d 367, 369.]

Negotiations for a revision of the contract between the parties were carried on during the spring and summer of 1947 and resulted in September in an amendment beneficial to petitioner. During the negotiations petitioner raised the question as to whether the revision was being delayed because of assertions in a trade publication that petitioner was a Communist. Petitioner was given assurance that respondent was not interested in petitioner's politics or these charges. [R. 256-8, 304-6, 318-20, 353-4, 376-7, 396-405, 434-40, 549-72.][4] In the course of the discussions petitioner stated that he had an opportunity for other employment and would be willing to cancel his contract with respondent.[5] [R. 403, 438.]

In September, 1947, one of respondent's executives told petitioner that a U. S. Marshal had a subpoena for him for the hearing before the Committee and, after petitioner had indicated that he did not want to avoid service, he was served in the office of the head of respondent's contract department, who, immediately afterwards, said, "Now that that is over, let us get down to our business." [R. 446-8.]

Before the amendment to the contract was executed, petitioner had a non-contract discussion with Louis B. Mayer, head of respondent's studio, in which Mayer told petitioner that investigators for the Committee had inquired about petitioner's political affiliations and had been told by Mannix, respondent's studio manager and vice-president, that he didn't give a damn whether petitioner

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[4]This evidence, which was later a basis for the claim of waiver or condonation, was introduced without intimation of such purpose and over respondent's objection that the negotiations were merged in the written amendment of the contract. [R. 431-2, 434-7.]

[5]Except as indicated, respondent was not "notified." [See P. S. p. 7.]

was a Communist or a Democrat or a Republican. Mayer said he would make the same statement. Mayer told petitioner of Mayer's plans for him and expressed the wish that petitioner would curtail the activities that caused talk about his being a Communist. Petitioner assured Mayer that petitioner was not a Communist.[6] [R. 348-51, 440-43.]

In the spring of 1947, Eric Johnston, president of Motion Picture Association of America, Inc., was turned down on a suggestion that the industry refuse to employ "proven Communists."[7] [R. 810-11.]

Before going to Washington nineteen men (who became known as the "unfriendly witnesses"), of whom petitioner was one, joined in an "open letter" to the industry. [R. 638-43.] These men were jointly represented during the hearing by a battery of six lawyers. [R. 415-18.] They conferred together prior to and during the hearing as to the manner in which they would conduct themselves during the hearing [R. 638-56] and agreed as to that conduct. [R. 362-3.] Eleven of the unfriendly witnesses testified at the hearing [R. 426]—ten before petitioner was called [R.

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[6]The petition refers to the Mannix conversation as transmitted by Mayer, which differed from Mannix's own version. [R. 298-301.] Petitioner's version of his conversation with Mayer, but solely as to the part unfavorable to respondent, was presented—on the issue of waiver—in the charge to the jury. [R. 907-9.]

[7]Petitioner seems to suggest that this was known to him at an early date [P. S. p. 6] but there is no evidence that he had heard of it before the Committee hearing, at the same time that he heard Johnston (characterized by petitioner [P. S. p. 7] as "the spokesman for the industry") testify that he would not employ any proven Communist. [R. 506-13.]

533, 646]—and it is a fair inference that ten, including petitioner, refused to answer whether they were Communists.[8] [R. 362, 379-86, 284-7.]

Immediately before the hearings the attorneys for the "unfriendly witnesses" requested and held a meeting with representatives of the Association of Motion Picture Producers. It was concerned with a motion to quash being filed by the unfriendly witnesses and the position to be taken by the industry at the hearings. The industry representatives said that they had publicly welcomed the hearing and could not attack its legality. At the close of the hearing, in reply to a suggestion that he had agreed with the Committee on a blacklist, Johnston said he had not and would not stand for any such thing. [R. 405-28, 737-49, 768-72.]

Both before and during the hearings Johnston and Paul V. McNutt, an attorney specially employed to represent the industry at the hearings, issued certain oral and written statements as indicated by the petition. [P. S. pp. 8, 9 and 10.] The substance of these can be summed up in the words of the Circuit Court as indicating that "the employers as well as the employees resented and disliked the whole investigation . . ." [R. 1014.]

In May, 1947, a sub-committee held a closed hearing in Los Angeles to the accompaniment of nation-wide publicity. [R. 351-2, 321, 638-43, 755.] Investigators for the committee achieved added publicity in June, 1947. [R. 287-91, 299-300, 321-34, 758-9.] The actual hearing ran from October 20, to October 30, 1947. Various prominent

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[8]None of these facts which, among others, led the Circuit Court to conclude that evidence as to the conduct of all ten should have been admitted [R. 1039-40] appear in the petition.

members of the industry were witnesses, including petitioner and ten others of the unfriendly witnesses—plaintiff being the last of these to testify. [R. 321, 505-6, 417-19, 501, 620-1, 625, 644-6, 411-12, 525-6, 533, 535.] Petitioner not only refused to answer the inquiry as to whether he was or had been a Communist but he attacked the motives of the Committee. [R. 478-84.] Immediately upon leaving the witness stand he distributed to the press over a hundred copies of a statement (derogatory to the Committee) which he had prepared before the hearing and sought to read at the hearing. [R. 473-5, 859.] The hearings were so thoroughly communicated to the public by every media of communication as to make them the leading topic of news and discussion.[9] [R. 351-3, 471, 651, 656-64, 778, 859; Defts. Exs. G and H, R. 783-4.]

Before petitioner took the witness stand he heard Mr. Mayer testify that the latter was unalterably opposed to Communism; that Communists should be denied the sanctuary of the freedom they sought to destroy, and that if he knew that men employed by him believed in Communism he would not keep them in his employ.[9] [R. 363-7, 505-6, 513-19.]

Respondent's first knowledge that petitioner intended not to answer questions relating to Communist membership and that he intended to defy the Committee in this regard came through learning of petitioner's actual conduct on the witness stand.[9] [R. 309-10, 351, 420-1, 499, 743-4.]

On the train returning from the Washington hearing Howard Strickling, respondent's public relations director, told petitioner that Mayer was terribly upset over the re-

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[9]None of these facts appear in the petition.

sults of the hearing and particularly "about the effect of this" on petitioner; that he was seeking some public relations formula—some statement which petitioner could make which the studio could publicize or some other method —which would overcome what he felt was a bad press and "whereby we could, Mr. Trumbo and myself, get out of this." [R. 574-6, 682-3.]

Mr. Mayer and petitioner then had a discussion in which Mayer told petitioner that he had had bad advice and had acted very unwisely because, if he belonged to the Communist Party, that was no crime, as Mayer saw it, and petitioner should have answered; that petitioner would not have had any problem on his hands; that petitioner had a great opportunity if this thing hasn't sprung up but Mayer didn't know what this would do. Petitioner replied that he "had to stick with the gang."[10] [R. 362-3.]

Petitioner returned to work. At the time of his suspension he had been cited for contempt but the citation had not matured into a court action [R. 808] and at the time of trial he had not been convicted [R. 859-862], but of the fact that he was guilty of contempt there could be no serious question.[11] [See P. S. pp. 10, 11.] After

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[10]The petition contains no reference to the Mayer testimony heard by petitioner, nor to the Strickling conversation, nor to respondent's ignorance of petitioner's intention to defy the Committee and only an innocuous reference (from petitioner's standpoint) to the conversation with Mr. Mayer. [P. S. p. 10.] This was part of the evidence—favorable to respondent—not referred to in the trial court's charge relative to waiver.

[11]*Barsky v. U. S.*, 167 F. 2d 241; *Josephson v. U. S.*, 165 F. 2d 82; *Lawson v. United States* and *Trumbo v. United States*, 176 F. 2d 49, *cert. den.*, 339 U. S. 934.

returning to work, after his conversation with Strickling about public relations and after learning of the declaration of policy (presently referred to), petitioner issued an affidavit which, if anything, was more contemptuous of the Committee than his conduct on the witness stand.[12] [R. 687-9.]

As a consequence of the conduct of the unfriendly witnesses and the resulting nation-wide furor, representatives of respondent and of a large majority of the motion picture producing companies, after discussions extending over November 24 and 25, 1947, and with the advice of counsel, adopted a declaration of policy to the effect that of the "ten Hollywood men . . . cited for contempt . . ." those who were then employed would be discharged or suspended and none of the ten would be employed or re-employed until he had been acquitted or purged of contempt and had declared under oath that he was not a Communist. [R. 336-9, 354-7, 389-95, 784-92, 812-17.]

The discussion which led up to the adoption of the policy was gone into at some length but subject to a limiting ruling that it was admitted only to show the nature of the discussion and not as evidence of the facts recited.[13]

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[12]Not mentioned in the petition.

[13]Portions of the meeting's proceedings and its accomplishment, *i.e.*, the policy declaration, were introduced by petitioner but respondent was denied the introduction of evidence showing that the reasons for the adoption of the policy were the conduct of the unfriendly witnesses and the public reaction to that conduct.

[R. 385-6, 792-3.] The discussion in summary was one in which it was the consensus that the unfriendly witnesses had led a substantial part of the public to believe that they were Communists and that the motion picture industry was harboring Communists and fostering Communism; that the unfriendly witnesses, as a consequence, had shocked and offended the community and brought themselves and the industry into public scorn and contempt; and that the retention or employment of the unfriendly witnesses would create new and aggravate already created public ill-will against the industry.[14] [R. 786-92, 380-95.]

On December 2, 1947, petitioner was given his notice of suspension.[15]

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[14]See the petition's restricted account of this meeting which is there characterized as a decision "to blacklist a group of persons, including petitioner." [P. S. p. 11.]

[15]The petition states as a fact that "the respondent's executives bowed to that policy (declaration) with obvious reluctance." It appears clearly that the declaration of policy was joined in voluntarily by respondent and that the suspension was dictated by its executives. [R. 282-7, 336-40, 354-7, 375-6, 385-95, 784-93, 812-17.] There is no evidence to the contrary. Had there been an unwarranted interference by third parties, the only result would be a cause of action against them. As between the parties to the contract, the question is not why the employer acted but whether he had the right so to act. (*May v. New York M. Pict. Corp.*, 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Development Co. v. King* (C. C. A. 2), 161 Fed. 91, 93; *Comerford v. Inter. Harvester*, 235 Ala. 376, 178 So. 894; 39 C. J. 89, Sec. 90; 56 C. J. S. 435, Sec. 44.)

Questions Presented.

1. In an action seeking a judgment declaring the rights and duties of the parties under a contract of employment, in which action the controversy centered around petitioner's claim that respondent had violated the contract by suspending his compensation and employment and respondent defended on the ground that its refusal of further performance was justified and excused by petitioner's prior breach, were special verdicts of the jury, directed to issues of fact relating to petitioner's breach, verdicts at law or were they merely advisory so as to render immaterial serious and prejudicial errors in the trial court's charge to the jury?

2. Assuming the answer to the foregoing question to be that the verdicts were only advisory, may that question be raised for the first time in a petition for a writ of *certiorari* and without prior presentation to the Court of Appeals?

3. Under a contract of employment by which the employee has agreed to conduct himself with due regard to public conventions and morals and not to do or commit any act that will tend to bring him into public hatred, scorn or contempt or shock, insult or offend the community or prejudice his employer, and there is credible evidence that the employee engaged in public and extensively publicized conduct which involved the commission of a crime, brought him into contempt of Congress, and led the public generally to believe that he was then a member of the Communist Patry, may it be found that the employee violated his agreement?

4. On the facts recited in question 3 above, may it be urged for the first time on a petition for a writ of *cer-*

tiorari and without prior presentation to the Court of Appeals that the Court of Appeals erred in holding that such conduct could have been found to have been without due regard to public morals and conventions, simply because that precise contention was not made by respondent in the Court of Appeals, although it was contended there that the agreement generally had been violated by petitioner?

5. In the action referred to above, was it error for the District Court to have instructed the jury:

(a) On the law of libel, although no issue of libel or defamation was in any way involved;

(b) That the Communist Party was a lawful organization in the State of California, notwithstanding that a statute of that state makes it a felony to advocate the overthrow of government by force or violence, and the respondent, on petitioner's objection that the evidence was irrelevant, was precluded from proving that the Communist Party in fact engaged in such advocacy;

(c) That in answering a special verdict as to whether petitioner's breach of contract had been waived by respondent's conduct *after* the breach had occurred, the jury could and should consider and give effect to evidence of respondent's conduct *before* that breach?

6. Did the District Court err in excluding evidence which would have shown the publicly discrediting conduct of others with whom the petitioner had conspired to bring about that conduct and with whom petitioner was associated in the public mind and for whose conduct petitioner was legally responsible under state law?

Argument.

1. While it is no doubt the rule that a final judgment of a Court of Appeals is not an indispensable prerequisite of review on *certiorari,* it is still true that "it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . Only in very few situations, where intermediate rulings may carry serious consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction . . ." [*Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 123-4, in which the mode of review was *certiorari.*] Here, the judgment to which the petition is directed is not final, for it remands the cause to the District Court for a new trial. [R. 1041. *Gospel Army v. Los Angeles,* 331 U. S. 543, 546.] Of course, the writ of *certiorari* does not issue merely to provide "the defeated party in the Circuit Court of Appeals another hearing . . ." [*Magnum Import Co. v. Coty,* 262 U. S. 159, 163.] So, in the case of a non-final judgment, only reasons of pressing public importance will ordinarily justify further review after decision by a Court of Appeals. [*Hamilton Shoe Co. v. Wolf Brothers,* 240 U. S. 251, 258.]

No such reason for review is to be found in the case at bar. In essence the action is an ordinary contract suit between private persons. Because the incidents which give rise to the controversy occurred in the course of a widely publicized hearing before the Committee on Un-American Activities, and related to that Committee's inquiry into the menace of Communism, the case has a dramatic and even a sensational quality not often found in contract actions. But the questions of law which it precipitated are only those which are usually to be found in private contract

litigation. Important as these questions may be to the parties, there is nothing of such public consequence about them as to justify the intervention of the Supreme Court of the United States.

2. The reversal of the District Court's judgment was impelled by a number of prejudicial errors in the charge to the jury and in rulings on the exclusion of evidence. If it be assumed (contrary to the fact, as will be shown in a moment, paragraph 3, *post*) that errors in the charge were immaterial because the jury's verdict was advisory only, as petitioner contends [Petition, pp. 16-22], the errors in evidentiary rulings remain to be dealt with. They were not rendered immaterial by the asserted advisory nature of the jury's participation in the case. These erroneous rulings withdrew from consideration testimony which, if admitted and considered by the trial court, might well have changed the result. [R. 651, 721, 731, 828-44, 357-8, 782-4, 823, 593-603, 613-17, 674-77, 590-619.]

These errors were, by themselves, enough to justify reversal of the judgment. [R. 1032, 1038-40.] It is, therefore, immaterial and no ground for *certiorari* that the matter of the charge was incorrectly disposed of by the Court of Appeals, if in fact it did err in that regard. Petitioner insists quite vigorously that errors in the charge adverse to respondent were immaterial because the jury's verdict was only advisory and, therefore, the trial judge was entitled to come to an independent conclusion on the facts. Assuming that to be so, he is in no position to complain of a judgment of reversal supportable on *other grounds* and which, in respect of the charge to the jury, can affect him only by inducing an erroneous but similarly immaterial charge at the second trial.

3. In point of fact the contention, that the jury's verdicts were advisory and the charge therefore of no consequence, is incorrect. To be sure, the action is in form one for a declaratory judgment. But, whatever may be the classification of such actions in the state courts, in the Federal system they are neither legal nor equitable, but *sui generis*. [*Pacific Indemnity Co. v. McDonald* (C. C. A. 9), 107 F. 2d 446, 448; *Hargrove v. American Cent. Ins. Co.* (C. C. A. 10), 125 F. 2d 225, 228; *Great Northern Life Ins. Co. v. Vince* (C. C. A. 6), 118 F. 2d 232, 233-4, *cert. den.* 314 U. S. 637; Borchard, Declaratory Judgments (1934), p. 120]. The Declaratory Judgments Act [28 U. S. Code, Sec. 2201] is a procedural statute, adding a new remedy for cases of which the Federal courts already had jurisdiction. [*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (C. C. A. 5), 137 F. 2d 176, 179, *affirmed* 321 U. S. 590.] It does not transform into a suit in equity a controversy which, apart from the Act, would be determined by an action at law.

The right to have a jury trial of an issue of fact in declaratory actions [F. R. C. P., Rule 57], therefore, depends on the nature of the ultimate claim or defense upon which the issue bears. If the issue is one which, in the absence of a declaratory judgment statute, would be triable to a jury of right it is so triable when the action is for declaratory relief. [*Pacific Indemnity Co. v. McDonald, supra,* 107 F. 2d at 448-9; *Aetna Casualty etc. Co. v. Quarles* (C. C. A. 4), 92 F. 2d 321, 325; *United States Fidelity etc. Co. v. Koch* (C. C. A. 3), 102 F. 2d 288, 291; *Piedmont Fire Ins. Co. v. Aaron* (C. C. A. 4), 138 F. 2d 732, 734.]

An issue of fact by itself is neither legal nor equitable. It draws its coloration from the surrounding environment. [*Pacific Indemnity Co. v. McDonald, supra,* 107 F. 2d at 448.] It is the nature of the controversy, not the method of its presentation, that is determinative. [*Cf., Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 244.] The question whether certain conduct did or did not take place, and whether it did or did not have certain consequences, may be legal or equitable depending on the nature of the claim or defense to which it is directed. Here, that claim was breach of contract and consequent liability to pay money damages; the defense was excused performance because of petitioner's prior breach. In that context the issues of fact were legal; a jury trial was a matter of right; and the jury's verdicts were as conclusive as they would have been if returned in an action at law for damages. [*Dickinson v. General Accident F. & L. Assur. Corp.* (C. C. A. 9), 147 F. 2d 396, 397; *Lumbermens Mut. Cas. Co. v. Timms & Howard* (C. C. A. 2), 108 F. 2d 497, 499.] And that result follows even though an equitable claim is also made in the action, if that claim depends on the same facts as the law claim. [*Bruckman v. Hollzer* (C. C. A. 9), 152 F. 2d 730, 732.]

The only equitable relief sought below was an injunction to compel respondent to set aside its suspension notice, *i.e.,* to reinstate petitioner in his contract employment. [R. 6.] Whether that relief could be given depended on exactly the same facts as were at the foundation of the claim at law. The relief awarded in this respect was not mandatory, but alternative. The judgment ordered reinstatement *or* payment of damages. [R. 188-9.] In effect, then, the judgment awarded purely legal relief, for

respondent was under no compulsion to reinstate. The judgment could have been fully satisfied by a money payment.

4. The injunctive feature of the case is now *moot,* as it also was at the time of the decision of the Court of Appeals. The contract term of petitioner's employment expired on November 14, 1949.[16] [R. 24, 33.] The most that could have been given him at the time the Court of Appeals acted, or that can be given him on a second trial, is a money judgment. On the legal phases of the case, which were all that were open in the Court of Appeals, the jury's verdicts were not and could not have been treated as advisory. The extent to which they might otherwise have been advisory, is now merely an academic question. *Certiorari,* of course, does not issue to review moot points. [*Cf., C. M. Patten & Co. v. U. S.,* 289 U. S. 705; *First Union Trust & Savings Bank v. Consumers Company,* 290 U. S. 585, 586.]

5. Petitioner's contention as to the advisory nature of the jury's verdicts, upon which all else in his petition hinges, is made for the *first time* in this Court. It was not made in his briefs or supplemental memoranda in the Court of Appeals. It was not made in oral argument. Nor was it presented by a petition for rehearing. The nearest approach to it was the assertion, in argument at the bar of the Court of Appeals, that the trial court's

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[16]The judgment of the Court of Appeals was rendered on November 22, 1950. [R. 1041.] Of course the propriety of an injunction depends on the situation at the time of judgment in the Court of Appeals. [*American Steel Foundries v. Tri-City C. T. Council,* 257 U. S. 184, 201; *Dr. Miles C. Co. v. Sontag C. Stores Co.,* 8 Cal. 2d 178, 179, 64 P. 2d 726.]

finding on a matter allegedly not submitted to the jury (*i.e.*, that petitioner had been led by respondent's acts to believe his conduct before the Committee on Un-American Activities would not be considered a breach of contract [R. 177-8]) was sufficient by itself to support the judgment.[17] There was not, even in connection with that contention, the slightest intimation of any claim that the verdicts, as far as they went, were only advisory.

The point now sought to be made is, therefore, not open to petitioner, because not made below. [*Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380. *Cf., Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182; *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 100; *U. S. v. Hoffman*, 335 U. S. 77, 79.] Certiorari does not issue when the question sought to be reviewed is not available on the record. [*McCullough v. Kammerer Corp.*, 323 U. S. 327, 328; *Tyrell v. District of Columbia*, 243 U. S. 1, 5-6; *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U. S. 430, 431, 433-4.]

6. The contention that the trial court's findings as to the true meaning of the contract and "waiver" of its provisions before breach in themselves support the judgment of the District Court [Petition pp. 22-30] is without merit. So far as the "waiver" finding is concerned, it is true that the special verdict submitted in that regard was limited, at respondent's request, to conduct occurring after

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[17]The short answer to that contention is that the matter was submitted to the jury under the general heading of "Waiver." This is made clear when special verdict 4 is read in the light of the charge on waiver, in which the jury were specifically told that if there was such inducement by respondent, petitioner's breach of contract had been waived. [R. 907-9, 961.] See paragraph 6, *post*.

petitioner's breach of contract. [R. 920.] But that limitation was completely nullified by the charge on waiver, in which, at the very outset, the jury were told they could find a waiver from respondent's conduct *prior* to petitioner's breach.[18] [R. 907-10.] Waiver arising from antecedent conduct was, therefore, a matter submitted to the jury. The verdict on that issue could not properly have been overriden by the trial judge. The serious errors in the charge in that regard, which undoubtedly affected the jury's conclusion on the subject of waiver, were, therefore, material and prejudicial. In fact, this very conflict between the narrow scope of the special verdict and the all-inclusive breadth of the charge was alone reversible error.

So far as interpretation of the contract is concerned, it cannot be denied that ascertainment of meaning and legal effect is a question of law. [*Estate of Platt,* 21 Cal. 2d 343, 352, 131 P. 2d 825, 830, and cases there cited; *Floyd v. Ring Const. Corp.* (C. C. A. 8), 165 F. 2d 125, 129, *certiorari denied* 334 U. S. 838; *Bell v. Bruen,* 1 How. (42 U. S.) 169, 183.] True enough, when extrinsic evidence is produced in aid of interpretation, and that evidence is *conflicting,* the fact-trier's resolution of the conflict is given the same conclusiveness as any other finding of fact. But when there is no such evidence, or such as there is has not been contradicted, the interpretation of the contract, in the light of the undenied extrinsic facts, is still a question of law. So too is it a question of law

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[18]The actions and statements referred to in the charge as supplying the basis for a finding of waiver all occurred before the petitioner testified before the Committee. [R. 471-86, 453-7, 459-60, 463-4, 809-12.]

when, to determine the legal effect of a contract, the extrinsic evidence is accepted in the version most favorable to the prevailing party. [*Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 314, 188 P. 2d 470, 478-9; *Estate of Platt, supra,* 21 Cal. 2d at 352, 131 P. 2d at 830, and cases there cited; *Ewing v. Von Nieda* (C. C. A. 8), 76 F. 2d 177, 181.]

The Court of Appeals gave full effect to the extrinsic evidence produced by petitioner. It disregarded none of it. [R. 998-1013.] Accepting that evidence as true for purposes of its consideration, it was entitled to differ from the trial court as to the legal effect of that evidence and thus arrive at a different conclusion of law as to the meaning of the contract.

Furthermore, if the interpretation assertedly made by the trial court was sound, that is, if conduct of the sort indulged in by petitioner was not within the proscription of the contract, there was nothing in that regard to submit to the jury. Yet, the trial court did submit special verdicts with respect to that conduct and its effect on the public. That could only have been done on the tacit assumption that if verdicts were returned in respondent's favor petitioner's breach of contract would be fully established as a matter of fact; from which the only correct conclusion of law would have been that respondent was excused from performing its part of the bargain. [*Los Angeles Gas etc. Co. v. Amalgamated Oil Co.,* 168 Cal. 140, 143, 142 Pac. 46, 47-8; *Los Angeles Gas Co. v. Amalgamated Oil Co.,* 156 Cal. 776, 778, 106 Pac. 55, 57; *Towney v. People's Ice Co.,* 66 Cal. 233, 234, 5 Pac. 158, 159; *Dunn v. Daly,* 78 Cal. 640, 644-5, 21 Pac. 377,

378-9; *Kulawitz v. Pacific etc. Paper Co.*, 25 Cal. 2d 664, 669, 155 P. 2d 24, 27; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 280-1, 139 Pac. 671, 674; *Wood etc. Co. v. Seurich*, 5 Cal. App. 252, 253-5, 90 Pac. 51, 52; *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 796, 256 Pac. 296, 297; *Cameron v. Burnham*, 146 Cal. 580, 584, 80 Pac. 929, 930.] That having been the theory submitted to the jury, respondent was entitled to have the jury correctly instructed on matters bearing upon their consideration of this phase of the case. The Court of Appeals did no more than give effect to this plain right of the respondent.

7. With the impressive preface that the case at bar "raises an important question in the administration of justice and substantive law, viz.: whether contractual promises under our legal system are 'no more than teasing illusions' . . ." petitioner goes on, somewhat anticlimactically, to argue that the Court of Appeals found petitioner's conduct to have violated a clause of the contract not specifically mentioned in the notice of suspension. [Petition pp. 30-33.] The clause in question is found in the same short paragraph of the contract upon which the notice was based [R. 12]; and the conduct found to have been a violation is the identical conduct to which the notice was expressly directed. In holding that this conduct could have been found, under proper instructions, to have been a violation of the contract and, therefore, a lawful excuse for respondent's refusal to perform further, the Court of Appeals followed, rather than disregarded, relevant precedent.

It is well established that when an employer is sought to be held for an allegedly wrongful termination of an

employment contract, he may justify on any ground which in fact existed at the time, even though not then assigned as the reason for his action. [*In re Nagel* (C. C. A. 2), 278 Fed. 105, 109; *Farmer v. First Trust Co.* (C. C. A. 7), 246 Fed. 671, 673; *Carpenter Steel Co. v. Norcross* (C. C. A. 6), 204 Fed. 537, 539-40; *Independent L. Ins. Co. v. Williamson,* 152 Ky. 818, 822, 154 S. W. 409, 411; *Macauley v. Press Pub. Co.,* 170 App. Div. 640, 646, 155 N. Y. S. 1044, 1048, *affirmed* 222 N. Y. 696, 119 N. E. 1055. The cases are collected in: 39 C. J. 89, notes 70. 72; 56 C. J. S. 428, note 20; 56 C. J. S. 435, Sec. 44.] The Court of Appeals gave effect to that rule. Cases, such as those cited by petitioner at page 32, finding an estoppel, by judgment or by conduct, to rely on an additional ground are, of ocurse, in a different category. No issue of estoppel was tendered here. There is no showing of such prejudicial reliance on the notice as would have created any estoppel; and, of course, there is no claim of estoppel by judgment. [R. 84-5.]

It cannot be seriously argued that commission of a crime is not contrary to public conventions or morals. Nor is the crime which petitioner committed any less so because it precipitated a test of the powers of a Committee of the Congress. This Court has never sustained the *right* to refuse to answer pertinent inquiries of such a committee. [*In re Chapman,* 166 U. S. 661, 668, 671; *Sinclair v. U. S.,* 279 U. S. 263, 294-6. See, also: *Lawson v. U. S.* (App. D. C.), 176 F. 2d 49; *certiorari denied,* 339 U. S. 934; *Barsky v. U. S.* (App. D. C.), 167 F. 2d 241, 250, *certiorari denied,* 334 U. S. 843; *U. S. v. Josephson* (C. C. A. 2), 165 F. 2d 82, 88, *certiorari denied,* 333 U. S. 838; *Dennis v. U. S.* (App. D. C.), 171 F. 2d 986, 987-8, *af-*

firmed 339 U. S. 162.] All that it has done is to hold that the wilful refusal to answer, which is punishable as a crime, is still wilful and criminal even though brought about by a *bona fide* belief that the question is impertinent instead of by some evil purpose. [*Sinclair v. U. S., supra,* 279 U. S. at 299.]

8. The judgment of reversal can be and is supported without regard to the Court of Appeals' determination that respondent was entitled, as a condition of continuing petitioner's employment, to require that he purge himself of contempt and swear that he was not a Communist. [R. 1025-29.] Assuming those conditions to have been beyond respondent's power to impose, their imposition amounted, in legal effect, only to a violation of the contract by respondent. But, as the Court of Appeals properly held, if it were found that petitioner's conduct was itself violative of the contract, respondent was excused from performing, notwithstanding its breach, because petitioner's violation occurred first. [R. 1028-9.] That holding is plainly in accord with the California rule [Cases cited at conclusion of paragraph 6, *ante*], by which the substantive rights of the parties are necessarily controlled. [*Erie R. Co. v. Tompkins,* 304 U. S. 64.] It is thus seen that the question posed by petitioner need not be reached to uphold the judgment of the Court of Appeals; and, therefore, should not be made the basis for further review on *certiorari.*

The argument that the views of the Court of Appeals in this respect were contrary to state law, is untenable. [Petition, p. 35.] In California, while judicial notice of the Communist Party's advocacy of violent overthrow of government is not taken, such advocacy in fact is unlawful and criminal and, of course, may be proved as a fact when

relevant. [*Cal. Stats,* 1919, c. 188, p. 281; *Whitney v. California,* 274 U. S. 357, 368-72; *People v. McClennegen,* 195 Cal. 445, 452, 234 Pac. 91, 94; *People v. Taylor,* 187 Cal. 378, 385-90, 203 Pac. 85, 87-90; *People v. Steelik,* 187 Cal. 361, 369-70, 203 Pac. 78, 81. See, *Danskin v. San Diego etc. Dist.,* 28 Cal. 2d 536, 544-5, 171 P. 2d 885, 890-1. Cf. 18 U. S. Code, sec. 11 (1946 ed.), 18 U. S. Code, sec. 2385 (1948 rev. ed.); *U. S. v. Dennis* (C. A. 2), 183 F. 2d 201, *certiorari granted* ..... U. S. ....., 95 L. Ed. (Adv. Op.), 43.] Had respondent been permitted to prove, as it sought to do and as most people now commonly believe [see, *American Communications Assoc. v. Douds,* 339 U. S. 382, 422-33; *U. S. v. Dennis, supra,* 183 F. 2d at 212, 226 (syl. 23)] that the Communist Party in fact engages in that advocacy, the illegal nature of the party would have been apparent.

Once that fact had been established it would have made inapplicable section 1101-3 of the California Labor Code; for these statutory provisions have been held by the State Supreme Court not to relate to membership in such an unlawful organization. [*Lockheed Aircraft Corp. v. Superior Court,* 28 Cal. 2d 481, 485, 171 P. 2d 21, 22.] The fact was not established in the instant case because of petitioner's objection that it was irrelevant. [R. 829-44.] He is, therefore, in no position to claim the benefits of a statute to which he would not have been entitled had he permitted his opponent to make the evidentiary showing which it offered to make.

9. Petitioner advances in general terms the proposition that the trial court's charge was without error. He discusses specifically, however, only three of the many errors assigned to the charge. [*Petition,* pp. 36-39; R. 984-8.] We confine our reply to those three matters.

The Court of Appeals did not find the charge as to rights of witnesses before Congressional committees free from error. [*Petition,* p. 37.] It expressly held this portion of the charge "erroneous, misleading and prejudicial . . ." [R. 1030]. It was the petitioner who requested a charge on this subject, on the theory that if he acted within his rights before the Committee that fact had a material bearing on the jury question of the public effect of his conduct [R. 108-10, 124-30]; a theory which the trial court adopted and gave to the jury. [R. 911-13.] That being so, it was necessary that the jury should have been told, as it was not (and as has been recently held in respect of the very hearing here involved) that petitioner did not have the right to refuse to answer pertinent questions relating to membership in the Communist Party, and that his wilful refusal to answer was a crime. [*Lawson v. U. S., supra,* 176 F. 2d 49.]

So far as the instruction on libel is concerned, petitioner fails to show its relevancy to the issues here involved. The correctness of the charge as an abstract statement of law does not eliminate the error of having diverted the attention of the jury to a completely extraneous issue. [*U. S. v. Breitling,* 61 U. S. 252, 254-5; *Quercia v. U. S.,* 289 U. S. 466, 470; *Insurance Co. v. Baring,* 87 U. S. 159, 161-2; *Beaver v. Taylor,* 65 U. S. 637, 644; *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), 245 Fed. 853, 854-5.] Nor is that error minimized by the fact that respondent requested that the jury be told, as required by the California law of evidence [*Cal. Code of Civil Procedure,* sec. 2102; *People v. Mayes,* 113 Cal. 618, 625-6, 45 Pac. 860, 862], which is applicable to Federal trials [*F. R. C. P.,* rule 43(a); *Hagen v. Porter* (C. C. A. 9), 156 F. 2d 362, 365], that they should take judicial notice of the fact that many

persons in this country look with scorn and contempt on Communists.

That request was directly responsive to the issue of fact submitted to the jury, *i. e.*, did petitioner's conduct lead the public to believe that he was a Communist and thereby bring him into public scorn and contempt? It was no substitute for that request to give the jury an abstract and wholly irrelevant dissertation on the law of libel.

The instructions as to waiver were *not* given at respondent's request. [*Petition,* p. 38.] Respondent requested no instructions on that subject because it insisted at all times that waiver was not an issue. [R. 945-50, 694-6, 863-7.] What did happen, after the trial court overruled rsepondent in its claim that waiver was not an issue, and had delivered its charge on the subject, was that respondent objected to that charge as incorrect in various particulars. The trial court attempted, but failed, to meet some of these objections by an amendment of the charge. [R. 945-50, 955-62.]

10. The exclusion of evidence of the conduct of nine other persons before the Committee was error. There was evidence below from which it could have been found that petitioner and these nine others had conspired or agreed together to act as they did. [R. 362-3, 415-18, 638-43, 624-33, 648, 425-7, 530, 533, 646.] Under California law, that confederation made each of them fully responsible for the acts of the others in pursuance of the common plan. [*Dodge v. Meyer,* 61 Cal. 405, 421-2; *Mox, Incorporated v. Woods,* 202 Cal. 675, 677-8, 262 Pac.

302, 303; *Revert v. Hesse,* 184 Cal. 295, 301-3, 193 Pac. 943, 946.] Respondent, therefore, was entitled to show all of the publicly discrediting conduct for which petitioner was in law responsible. It was entitled to show that he was a member of a conspiracy, and, therefore, stood in the public eye tarred with the discrediting conduct of his conspirators as well as with his own individual acts.

Conclusion.

Because no question of great public importance is presented, nor is any conflict among the Circuits made out, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX.

STATE STATUTES CITED.

California Criminal Syndicalism Act [Cal. Stats. 1919, c. 188, p. 281]:

"Section 1. The term 'Criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who: * * *

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism:

* * * * * * * *

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

California Code of Civil Procedure:

"Section 2102: Questions of law addressed to the court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this

code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

California Labor Code:

"Section 1101. Rule, regulation or policy as to political activities or affiliations. No employer shall make, adopt, or enforce any rule, regulation or policy;

"(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

"Section 1102. Coercing or influencing political activities of employees. No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

"Section 1103. Violation of chapter a misdemeanor: Punishment. Any employer who violates this chapter is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1,000 or both, and in the case of a corporation, by a fine of not to exceed $5,000."